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Supreme Court of the United States.

OCTOBER TERM, 1923—NO. [redacted] 197

STANDARD OIL COMPANY (NEW JERSEY),
Petitioner,

—against—

SOUTHERN PACIFIC COMPANY and JAMES C. DAVIS, Director General of Railroads,
Respondents.

MOTION.

(1) That the order of this Court on November 12, 1923, granting a petition for a writ of certiorari be restricted to the respondents Southern Pacific Company and Director General of Railroads, and be vacated as to the personal injury, cargo and passenger claimants against whom no error is assigned in the petition; and/or

(2) That the transcript of record be diminished by at least 500 pages so as to include only evidence bearing directly or indirectly on the errors of law assigned in the petition and brief for certiorari.

D. ROGER ENGLAR,
T. CATESBY JONES,
JAMES W. RYAN,
Counsel for Roberts, Carter & Company and other cargo claimants.

HENRY O. FALK,
LAWRENCE B. COHEN,
Counsel for Bonita Hearn and Dolores Francis, personal injury and passenger claimants.

Supreme Court of the United States,

OCTOBER TERM, 1923—No. 607.

STANDARD OIL COMPANY (NEW JERSEY),
Petitioner,

—against—

SOUTHERN PACIFIC COMPANY and JAMES C. DAVIS,
Director General of Railroads,
Respondents.

MOTION.

(1) That the order of this Court on November 12, 1923, granting a petition for a writ of certiorari be restricted to the respondents Southern Pacific Company and the Director General of Railroads, and be vacated as to the personal injury, cargo and passenger claimants against whom no error is assigned in the petition; and/or

(2) That the transcript of record be diminished by ~~at least~~ 500 pages so as to include only evidence bearing directly or indirectly on the errors of law assigned in the petition and brief for certiorari.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The motion of Roberts, Carter & Company, cargo claimant, and Bonita Hearn and Dolores Francis, personal injury and passenger claimants, on their own behalf and on behalf of the other cargo, personal injury, and passenger claimants similarly interested, respectfully shows:

Facts.

1. In August, 1918, the steamships *Cushing* and *Proteus* collided at sea. The *Proteus* sank with her cargo and passengers' baggage. The lower courts concurred in finding both vessels at fault for the collision. They also concurred in directing that the cargo and passenger claims be paid in full by the *Cushing* before payment of the excess over half damages to the other wrongdoer, the *Proteus*. The personal injury, cargo and passenger claims amounted, without dispute, as of the date of the final decree, to $455,529.69. The *Cushing* gave security for, and her value was fixed in the limitation proceedings at $1,235,000.

2. The Trial Court found that the *Proteus*, before sinking, was worth $750,000 and, for the purpose of apportioning the half damage liability, assessed her owner's damages at that sum. On appeal the Circuit Court of Appeals increased the valuation of the *Proteus* to $1,225,000.

3. The Standard Oil Company, as owner of the *Cushing*, petitioned this Court for *certiorari* on two grounds: (1) that the damages and value of the *Proteus* were $750,000 as assessed by the Trial Court; and (2) that the settlement between the Southern Pacific Company, owner of the *Proteus*, and the other joint tort feasor, the Director General of Railroads, was a waiver of any right of recovery by the Southern Pacific Company from the *Cushing*. This second point was not suggested to the lower courts.

4. No error was assigned in the petition or brief for *certiorari* affecting the personal injury, cargo or passenger claims. The facts showing fault of both vessels in the collision have been concurrently found

by the lower courts. This Court, therefore, under the well-settled rule, will not consider them on *certiorari.*

5. The personal injury, cargo and passenger claimants are not interested in this controversy. The controversy is solely between the owners of the two vessels involved. It relates only to the errors of law assigned in the petition and brief.

Objects of the Motion.

1. The personal injury, cargo and passenger claimants, therefore, ask that they be severed from the case, and that a mandate as to their claims issue immediately. They have been deprived of their cargo and baggage for more than five years. The petitioner has suggested no reason why they should await the determination of this cause on *certiorari.* If they are not severed, or a ruling made at this time by the Court for diminution of the 912-page printed record so as to include only evidence bearing directly or indirectly on the errors assigned in the petition for *certiorari,* the Court will be burdened with argument and briefs on questions of fact which have been concurrently found by the lower courts and which consume more than 500 pages of the record.

2. The severance of the personal injury, cargo and passenger claims will in no way affect the continuation of the controversy between the two vessels. The respective vessel owners' petitions were consolidated for trial (Record, Vol. 2, p. 863). The personal injury, cargo and passenger claims were tried at the same time as the consolidated cause to avoid duplication of evidence on the question of fault in the collision; but each claim was separately proved and was indi-

vidually awarded in the final decree (Record, Vol. 2, pp. 870 to 896).

WHEREFORE, Roberts, Carter & Company, Bonita Hearn and Dolores Francis, on their own behalf and on behalf of the other personal injury, cargo and passenger claimants similarly interested, respectfully move:

(1) That the order of this Court on November 12, 1923, granting the petition of the Standard Oil Company (New Jersey) for a writ of *certiorari* be restricted to the respondents Southern Pacific Company and James C. Davis, Director General of Railroads, and that it be vacated as to the personal injury, cargo and passenger claimants against whom no error is assigned in the petition or brief for *certiorari;* and/or

(2) That the transcript of record filed by the petitioner for *certiorari* be diminished by at least 500 pages so as to include only evidence bearing directly or indirectly on the errors of law assigned in the petition and brief for *certiorari.*

Dated, New York City, November 13th, 1923.

D. ROGER ENGLAR,
T. CATESBY JONES,
JAMES W. RYAN,
Counsel for Roberts, Carter & Company and other cargo claimants.

HENRY O. FALK,
LAWRENCE B. COHEN,
Counsel for Bonita Hearn and Dolores Francis, personal injury and passenger claimants.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1923—No. 607.

STANDARD OIL COMPANY (NEW JERSEY),
Petitioner,

—against—

SOUTHERN PACIFIC COMPANY and JAMES C. DAVIS,
Director General of Railroads,
Respondents.

MEMORANDUM IN SUPPORT OF MOTION.

I.

This Court in granting the petition for certiorari did not intend to bring before it personal injury, cargo and passenger claimants whose claims are not contested by the petitioner.

Even if this Court should reverse the judgment of the Circuit Court of Appeals on both the grounds assigned as error in the petition and brief for *certiorari*, the passenger and cargo claimants would recover exactly the same sums awarded to them under the present judgment. See *The Beaconsfield*, 158 U. S. 303, where this Court held that the claims of innocent cargo owners are entitled to priority over the claim of the vessel owner against the fund available for the payment of damages sustained through a collision for which both vessels have been adjudged at fault. See also *The Atlas*, 93 U. S. 302, 315, and *Lovejoy* v. *Murray*, 3 Wall. 1.

The rule has long been settled, that, after an appeal is taken, the parties to the appeal are really the appellants and those parties to the action, whether plaintiff or defendant, who have an interest in sustaining the judgment or order appealed from. *Hiscock* v. *Phelps*, 6 Lans. 105. The cargo and passenger claimants have no interest in sustaining the decree of the Circuit Court of Appeals in so far as it is attacked by the errors assigned in the petition and brief for *certiorari*.

We need only refer to the elementary rule as stated in 8 Cyc. 611, under the title Consolidation and Severance of Actions; that

> "An appeal in one suit (of a consolidated cause) will only bring up that case, leaving the other causes in the Court below, and the decree as to them in full force and effect."

In *Mutual Life Insurance Co.* v. *Hillmon*, 145 U. S. 285, 293, this Court, speaking of causes which had been consolidated said:

> "But although the defendants might lawfully be compelled, at the discretion of the Court, to try the cases together, the causes of action remained distinct, and required separate verdicts and judgments."

In *Hanrick* v. *Patrick*, 119 U. S. 156, 164, this Court held that intervening petitioners in the lower Court, holding substantially the same position to the real parties to the controversy as the cargo and passenger claimants do in this case, were not necessary parties on an appeal. See also *Forgary* v. *Conrad*, 6 Howard 201; *Russell* v. *Stansell*, 105 U. S. 303.

In *Mason* v. *Marine Ins. Co.*, 110 Fed. 452, the United States Circuit Court of Appeals for the Sixth Circuit held that, in a collision case in admiralty, where a decree disposes of a number of distinct claims, an appeal by one party from an adverse decision as to one of such claims does not bring up for review the other portions of the decree.

In *Hume* v. *Frenz*, 150 Fed. 502, the Circuit Court of Appeals for the Ninth Circuit, in a situation on appeal very similar to that existing here, held that the real parties appellant and appellee were the two persons who admitted that either one or the other was liable for the amount of the third person's, the libellant's, claim.

The decree of the Circuit Court of Appeals concurring in the finding of fact that the *Cushing* was at fault, was in effect a dismissal of the personal injury, cargo and passenger claimants from further proceedings by *certiorari*. If one cause of action in a consolidated cause is severable and the parties may be severally liable, a dismissal as to one defendant constitutes a severance of the action. *Schuller* v. *Robison*, 139 App. Div. 97, 123 N. Y. S. 881.

If the District Court or the Circuit Court of Appeals had decided in accordance with the present contentions of the petitioner for *certiorari*, the personal injury, cargo and passenger claimants could not have appealed on those grounds. *Ex Parte Cutting*, 94 U. S. 14; *Guion* v. *Insurance Company*, 109 U. S. 173; *Elwell* v. *Fosdick*, 134 U. S. 513. It has long been the rule in admiralty that when a decree is several and independent as to different parties, each may appeal

separately. *Stratton* v. *Jarvis*, 8 Peters (U. S.) 4; *The Columbia*, 73 Fed. 226 (C. C. A.); *Thomas* v. *Lane*, 23 Fed. Cas. 13, 1902.

In *Oliver* v. *Alexander*, 6 Peters 31 (U. S.), 143, 147, this Court, speaking through Mr. Justice Story, said:

> "The claim of each seaman is distinct and several; and the decree upon each claim is, in like manner, distinct and several. One seaman cannot appeal from the decree made in regard to the claim of another; for he has no interest in it, and cannot be aggrieved by it. The controversy, so far as he is concerned, is confined solely to his own claim; and the matter of dispute between him and the owners, or other respondents, is the sum or value of his own claim, without any reference to the claims of others. * * * And the same rule applies to the owners or other respondents, who are not at liberty to consolidate the distinct demands of each seaman into an aggregate, thus making the claims of the whole the matter in dispute; but they can appeal only in regard to the demand of a seaman, which exceeds the sum required by law for that purpose, as a distinct matter in dispute. If the law were otherwise, it would operate in a most unjust and oppressive manner; for then the seamen would be compellable to file a joint libel; and if any controversy existed as to the claim of a single seaman, *all the others would be compellable to be dragged before the appellate tribunals, and incur enormous expenses, even when their own rights and claims were beyond all controversy, and, in truth, were not controverted.* The form of procedure would thus be made an instrument to subvert the very object for which it was instituted." (Italics ours.)

The fact that these proceedings were in the form of a petition for limitation of liability is immaterial,

in view of the fact that the limitation fund, consisting of the value of the steamship *Cushing,* is more than sufficient to pay all claims awarded by the judgment of the Circuit Court of Appeals.

II.

This Court in granting the petition did not intend to burden itself with a 912-page printed record, most of which relates to questions of fact concurrently found by the lower courts and not assigned as error.

At least 500 pages of the transcript of record filed in the Circuit Court of Appeals and re-filed by the petitioner in this Court, relate only to questions of fact as to which vessel was at fault for the collision. The courts below have concurred in finding those facts. It is not questioned by the petitioner, and indeed is indisputable that if those findings of fact are correct both vessels were at fault for the collision. This Court has repeatedly held that in admiralty cases it will not disturb concurrent findings of fact of the lower courts.

In *Pacific Mail Steamship Company* v. *Schmidt,* 241 U. S. 245, 250, Mr. Justice Holmes, delivering the opinion of this Court after a hearing on *certiorari,* said:

> "It seems to us a very strong thing to say that any fair construction of the facts brings the case within the act. But as the two courts have agreed upon this proposition also and *as the writ would not have been granted to reopen the inquiry into those particular facts we assume that upon this also they were right.*"

In *The S. B. Wheeler*, 20 Wall. 385, 386, a collision case, this Court said:

> "Questions of fact only are presented by this appeal. There is no dispute as to the law. Two courts have already found against the appellants. It has been over and over again ruled by this Court that under such circumstances the burden is on the appellant to show the error. Every presumption is in favor of the decrees below. We ought not to reverse unless the error is clear. Such is not the case here.
>
> It is, indeed, urged that the claimants, by their own proof, established the fact that there was no lookout at the bow of the *Wheeler* when the collision occurred. *This is so, but whether that was a contributing fault was a question of fact, and that has been twice found against the appellants.*
>
> We are entirely satisfied with all the findings."

In the present case the petitioner for *certiorari* has not even suggested error in any of the concurrent findings of fact of the lower courts as to fault in the collision.

See also:

The Quickstep, 9 Wallace 665, 669;
La Bourgoyne, 210 U. S. 95, 114;
The Conqueror, 166 U. S. 110, 136;
Compania de Navagacion la Flecha v. *Brauer*, 168 U. S. 104, 123;
The Carib Prince, 170 U. S. 655, 658;
Towson v. *Moore*, 173 U. S. 17, 24;
Smith v. *Burnett*, 173 U. S. 430, 436;
Workman v. *New York*, 179 U. S. 552, 555;
Morewood v *Enequest*, 23 How. 491;
The Iroquois, 194 U. S. 240, 247;
The Wildcroft, 201 U. S. 378, 387.

On *certiorari*, assignments of error neither argued nor submitted may be assumed to be abandoned, *Erie Railroad Co.* v. *Collins*, 263 U. S. 85.

In *Green County, Kentucky* v. *Thomas' Executor*, 211 U. S. 598, 601, this Court said:

> "*The case is here upon a writ of certiorari. It has been argued by the defendant, apparently upon the theory that all questions of law which were raised by it or were remotely suggested in the record, were open for consideration in the appellate court. But we ought not to encourage such looseness of practice.* Some of the questions raised by the defendant were passed on adversely to it in the Circuit Court of Appeals, and we do not intend to intimate any doubt of the correctness of the decision of that court. The writ of error sued out by the plaintiffs, and the assignment of errors which accompanied, set forth all the questions regarding the action of the court below, of which the appellate court was bound to take notice. *The Maria Martin*, 12 Wall. 31, 40; *Bolles* v. *Outing Company*, 175 U. S. 262. Neither that court nor this ought to be expected to search through a confused record for the purpose of finding errors." (Italics ours.)

The Court would also be burdened by many briefs on the question of fault in the collision, because in the absence of a definite ruling in advance by this Court, neither counsel for the hull claimants of the *Proteus* and *Cushing*, nor counsel for the cargo passenger claimants could know certainly whether this Court intended to review the entire case *de novo*, including possible errors of fact not assigned in the petition or brief for *certiorari*.

In *Texas & Pacific Railway Co.* v. *Leatherwood*, 250 U. S. 478, 482, this Court said:

> "The record occupies 213 printed pages. Most of the matter which was included in it at the instance of the petitioner was not required for the proper presentation of questions submitted here; much useless expense has been incurred; and both court and counsel have been subjected to the burden of examining much that is irrelevant."

Dated, New York City, November 13th, 1923.

Respectfully submitted,

D. ROGER ENGLAR,
T. CATESBY JONES,
JAMES W. RYAN,
Counsel for Roberts, Carter & Company and other cargo claimants.

HENRY O. FALK,
LAWRENCE B. COHEN,
Counsel for Bonita Hearn and Dolores Francis, personal injury and passenger claimants.

Notice of Motion.

SUPREME COURT OF THE UNITED STATES,

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—against—

SOUTHERN PACIFIC COMPANY and JAMES C. DAVIS,
Director General of Railroads
Respon. nts.

SIRS:

PLEASE TAKE NOTICE that, at the opening of the Court on the 26th day of November, Nineteen hundred and twenty-three, or as soon thereafter as counsel can be heard, a motion, and brief in support thereof, in the form annexed hereto, will be submitted to the Supreme Court of the United States for an order directing

1. That the order of the Supreme Court, entered on November 12th, 1923, granting a petition for a Writ of Certiorari, be restricted to the respondents Southern Pacific Company and the Director General of Railroads, and be vacated as to the personal injury, cargo and passenger claimants against whom no error is assigned in the petition; and/or

2. That the transcript of record be diminished by at least five hundred pages so as to include only evidence bearing directly or indirectly on the

errors of law assigned in the petition and brief for certiorari.

Dated, New York City, November 13th, 1923.

Yours &c.,

D. ROGER ENGLAR,
T. CATESBY JONES,
JAMES W. RYAN,
Counsel for Roberts, Carter & Company and other cargo claimants.

HENRY O. FALK,
LAWRENCE B. COHEN,
Counsel for Bonita Hearn and Dolores Francis, personal injury and passenger claimants.

To:

WILLIAM H. MCGRANN,
JOHN M. WOOLSEY,
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CHARLES C. BURLINGHAM,
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HONORABLE WILLIAM HAYWARD,
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